RECORD
AND
BRIEFS

Nos. 16-476 and 16-477

In the Supreme Court of the United States

CHRISTOPHER J. CHRISTIE, GOVERNOR OF NEW JERSEY, ET AL., PETITIONERS

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC., PETITIONER

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The Professional and Amateur Sports Protection Act (PASPA), 28 U.S.C. 3701 *et seq.*, prohibits States from "authoriz[ing] by law" sports-gambling schemes. 28 U.S.C. 3702(1). PASPA also prohibits private persons from operating sports-gambling schemes pursuant to state law. 28 U.S.C. 3702(2). The question presented is whether PASPA's prohibition on state authorization of sports-gambling schemes violates the Tenth Amendment.

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This brief is submitted in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petitions for writs of certiorari should be denied.

STATEMENT

These cases present the question whether Congress may, consistent with the Tenth Amendment, prohibit States from authorizing sports-gambling schemes. That question arises in the context of New Jersey's

multi-year effort to authorize sports gambling at the State's casinos and racetracks.

A. The Professional And Amateur Sports Protection Act

In 1992, Congress enacted the Professional and Amateur Sports Protection Act (PASPA), 28 U.S.C. 3701 *et seq.*, "to stop the spread of State-sponsored sports gambling." S. Rep. No. 248, 102d Cong., 1st Sess. 4 (1991) (Senate Report). At that time, States seeking to raise revenue were "considering a wide variety of State-sponsored gambling schemes," including state-operated sports lotteries and state-licensed or state-authorized private schemes such as "bets on sports at off-track betting parlors" and "casino-style sports books." *Id.* at 5. Congress concluded that "State-sanctioned sports gambling w[ould] promote gambling among our Nation's young people" and that the possible spread of sports gambling "sponsored or authorized by a State * * * [wa]s a problem of legitimate Federal concern for which a Federal solution [wa]s warranted." *Id.* at 4, 6-7.

PASPA's restrictions apply separately to States and to private parties. States (and other governmental entities) may not "sponsor, operate, advertise, promote, license, or authorize by law or compact," sports-gambling schemes. 28 U.S.C. 3702(1). A separate provision prohibits private parties from sponsoring, operating, advertising, or promoting such schemes "pursuant to the law or compact of a governmental entity." 28 U.S.C. 3702(2). Both restrictions apply to any "lottery, sweepstakes, or other betting, gambling, or wagering scheme" based on "competitive games in which amateur or professional athletes participate." 28 U.S.C. 3702.

The Attorney General can bring an action in federal court to enjoin violations of PASPA. 28 U.S.C. 3703. PASPA also authorizes sports leagues to seek injunctions against violations involving their games. *Ibid.*

When Congress enacted PASPA, four States (Delaware, Montana, Nevada, and Oregon) had sports-gambling schemes. Senate Report 8; 138 Cong. Rec. 12,973 (1992) (Sen. DeConcini). To protect those States' reliance interests, PASPA includes grandfathering provisions exempting their existing schemes. 28 U.S.C. 3704(a)(1)-(2); see Senate Report 8; *OFC COMM Baseball* v. *Markell*, 579 F.3d 293, 301-304 (3d Cir. 2009), cert. denied, 559 U.S. 1106 (2010). Congress also provided an exception for casino-based sports gambling authorized by New Jersey within one year of PASPA's effective date. 28 U.S.C. 3704(a)(3). New Jersey chose not to avail itself of that exception. Pet. App. 4a. As a result, PASPA's restrictions apply in New Jersey.

B. The 2012 Act And The *Christie I* Litigation

This is the second suit brought by sports leagues contending that New Jersey has contravened PASPA by enacting a statute that licenses and authorizes sports gambling. The first suit involved a 2012 statute, which the courts ultimately held invalid under PASPA.

1. New Jersey's constitution generally provides that "[n]o gambling of any kind shall be authorized by the Legislature unless the specific kind, restrictions and control thereof" have been approved by the State's voters. Art. IV, § 7, Para. 2. The constitution has long provided exceptions allowing the legislature to "authorize by law" gambling at casinos in Atlantic City and betting on horse races. *Id.* Para. 2(D) and (F). Until recently, there was no comparable exemp-

tion for sports gambling, which was expressly prohibited by statute. Pet. App. 4a; see N.J. Stat. Ann. § 2A:40-1 (West 2010).[1]

In 2011, New Jersey's voters amended the state constitution's exceptions for gambling at casinos and racetracks to allow the legislature to "authorize by law" sports gambling at those locations. N.J. Const. Art. IV, § 7, Para. 2(D) and (F). The amendment does not permit the legislature to authorize gambling "on a college sport or athletic event that takes place in New Jersey or on a sport or athletic event in which any New Jersey college team participates." *Ibid.*

After the amendment, the New Jersey Legislature enacted the 2012 Sports Wagering Act (2012 Act), 2011 N.J. Sess. Law Serv. 1723-1730 (West). The 2012 Act authorized licensed casinos and racetracks to conduct wagering on sporting events in accordance with the regulatory requirements applicable to their other gambling activities. See *NCAA* v. *Governor of N.J.*, 730 F.3d 208, 217 (3d Cir. 2013) (*Christie I*), cert. denied, 134 S. Ct. 2866 (2014).

2. The Nation's principal professional sports leagues and the NCAA, respondents here, filed a suit challenging the 2012 Act under PASPA. The defendants, petitioners here, were New Jersey officials and entities that sought to conduct sports gambling under the 2012 Act. *Christie I*, 730 F.3d at 217.[2]

Petitioners did not deny that the 2012 Act's authorization of sports gambling at licensed casinos and

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[1] References to "Pet. App." refer to the appendix to the petition for a writ of certiorari in No. 16-476.

[2] Although there are some differences between the defendants in the first round of litigation and the petitioners here, see Pet. App. 6a n.2, we refer to both groups as "petitioners" for simplicity.

racetracks conflicted with the provision of PASPA barring States from "licens[ing], or authoriz[ing] by law," sports gambling. 28 U.S.C. 3702(1). Instead, they asserted that Section 3702(1) is unconstitutional, arguing among other things that it violated the Tenth Amendment's anti-commandeering principle. The United States intervened to defend Section 3702(1)'s constitutionality, and the district court rejected petitioners' arguments. *NCAA* v. *Christie*, 926 F. Supp. 2d 551, 579 (D.N.J. 2013).

3. The court of appeals affirmed. As relevant here, the court rejected petitioners' contention that Section 3702(1) violates the Tenth Amendment. *Christie I*, 730 F.3d at 226-237. Contrasting PASPA with laws that had been found to violate anti-commandeering principles, the court noted that Section 3702(1) "does not *require* or coerce the states to lift a finger—they are not required to pass laws, * * * to expend any funds, or to in any way enforce federal law." *Id.* at 231. Instead, "PASPA sets forth a prohibition" barring States from licensing or authorizing sports gambling. *Ibid.* The court emphasized that "statutes prohibiting the states from taking certain actions have never been struck down" under the anti-commandeering rule. *Ibid.*

The court of appeals rejected petitioners' contention that Section 3702(1)'s prohibition on "authoriz[ing]" sports gambling requires States to take affirmative steps to enact, maintain, or enforce prohibitions on sports gambling. *Christie I*, 730 F.3d at 232. The court reasoned that, under Section 3702(1), "a state may repeal its sports wagering ban" or "choose to keep a complete ban," while "decid[ing] how much of a law enforcement priority it wants to make of sports gam-

bling, or what the exact contours of the prohibition will be." *Id.* at 233.

Judge Vanaskie dissented in part, arguing that Section 3702(1) violates the Tenth Amendment. *Christie I*, 730 F.3d at 241-251.

4. This Court denied petitioners' petitions for writs of certiorari. *Christie* v. *NCAA*, 134 S. Ct. 2866 (2014) (No. 13-967); *New Jersey Thoroughbred Horsemen's Ass'n* v. *NCAA*, 134 S. Ct. 2866 (2014) (No. 13-979); *Sweeney* v. *NCAA*, 134 S. Ct. 2866 (2014) (No. 13-980).

C. The Present Controversy

1. In response to the Third Circuit's decision, the New Jersey Legislature passed a bill that purported to "partially repeal[]" the State's prohibitions on sports gambling, but only "at racetracks and casinos." Pet. App. 83a (brackets and citation omitted). The Governor vetoed that bill, calling it "a novel attempt to circumvent the Third Circuit's ruling." *Ibid.* (citation omitted).

Two months later, the legislature passed another bill that again purported to partially repeal the State's prohibitions on sports gambling at casinos and racetracks, S. 2640, 216th Leg. (N.J. 2014) (the 2014 Act). Pet. App. 218a-222a. This time, the Governor signed the bill into law. The 2014 Act purports to repeal all state laws related to gambling, "to the extent they apply" to sports gambling that meets five requirements: (1) the gambling is conducted "at a casino or gambling house" in Atlantic City or "a running or harness horse racetrack"; (2) it consists of wagering by persons "situated at such location"; (3) the persons placing wagers are "21 years of age or older"; (4) "the operator of the casino, gambling house, or running or harness horse racetrack consents to the wagering or

operation"; and (5) the gambling does not include wagers on "a collegiate sport contest or athletic event that takes place in New Jersey or a sport contest or collegiate athletic event in which any New Jersey college team participates." *Id.* at 219a-220a.

2. Respondents filed a new suit, arguing that the 2014 Act conflicts with Section 3702(1) by "licens[ing]" and "authoriz[ing] by law" sports gambling. In response, petitioners contended that the 2014 Act's partial repeal was consistent with Section 3702(1) as interpreted in *Christie I*. Because petitioners did not renew their constitutional challenges in the district court, the United States did not intervene. But it filed a statement of interest agreeing with respondents that the 2014 Act conflicts with Section 3702(1) because it "license[s]" and "authorize[s] by law" sports-gambling schemes. D. Ct. Doc. 57, at 10-16 (Nov. 19, 2014).

The district court entered summary judgment for respondents, holding that the 2014 Act is preempted by PASPA because it "authorize[s]" sports gambling. Pet. App. 76a-113a.

3. A divided panel of the court of appeals affirmed. Pet. App. 47a-75a. The court then granted rehearing en banc and affirmed by a 9-3 vote. *Id.* at 1a-46a.

a. The en banc court held that the 2014 Act conflicts with PASPA because it "authorize[s]" sports gambling. Pet. App. 12a-16a. The court explained that although the 2014 Act is "artfully couched in terms of a repealer," it "essentially provides that, notwithstanding any other prohibition by law, casinos and racetracks shall hereafter be permitted to have sports gambling." *Id.* at 14a. Focusing on the substance of the law rather than its form, the court concluded that the 2014 Act "is an authorization." *Ibid.*

In so holding, the en banc court acknowledged that some language in *Christie I* could be taken to suggest that, as a categorical matter, "a repeal is not an authorization" within the meaning of PASPA. Pet. App. 22a. "To the extent that [*Christie I*] took the position that a repeal *cannot* constitute an authorization," the en banc court "reject[ed] that reasoning" as "unnecessary dicta." *Id.* at 13a, 23a (emphasis added). The court explained that "a state's decision to selectively remove a prohibition on sports wagering in a manner that permissively channels wagering activity to particular locations or operators is, in essence, 'authorization' under PASPA." *Id.* at 23a.[3]

The en banc court also reaffirmed its "prior conclusion that PASPA does not run afoul of anti-commandeering principles." Pet. App. 18a; see *id.* at 18a-26a. The court emphasized that "PASPA does not command states to take affirmative actions," such as enacting or maintaining prohibitions on sports gambling. *Id.* at 23a. And the court rejected the district court's conclusion that PASPA puts states to "a strict binary choice" between repealing their prohibitions on sports gambling entirely or retaining total bans. *Id.* at 24a. Instead, the court explained that "PASPA allows states to 'choose among many different potential policies on sports wagering that do not include licensing or affirmative authorization by the State.'" *Id.* at 23a (brackets and citation omitted).

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[3] Because the en banc court held that the 2014 Act is an "authoriz[ation]" of sports gambling, it did not address respondents' alternative argument, also made by the United States in its amicus brief, that the 2014 Act "license[s]" sports gambling by permitting it only at state-licensed casinos and racetracks. Pet. App. 16a n.7.

The en banc court thus emphasized that its holding that the "specific partial repeal which New Jersey chose to pursue in its 2014 Law is not valid under PASPA does not preclude the possibility that other options may pass muster." Pet. App. 24a. The court did not attempt to draw a comprehensive line between partial repeals that would amount to authorizations and those that would not, finding it sufficient to conclude that wherever such a line might be drawn, "the 2014 Law overstepped it." *Ibid.*

b. Judge Fuentes, joined by Judge Restrepo, dissented, arguing that the 2014 Act does not conflict with Section 3702(1). Pet. App. 27a-34a. Judge Vanaskie dissented separately, reiterating his view that Section 3702(1) violates the Tenth Amendment. *Id.* at 35a-46a.

DISCUSSION

The court of appeals held that the 2014 Act conflicts with 28 U.S.C. 3702(1) and reaffirmed *Christie I*'s conclusion that Section 3702(1) is consistent with the Tenth Amendment. Petitioners do not seek further review of the court of appeals' statutory holding. Instead, they contend (Pet. i, 16-35) that Section 3702(1) violates the Tenth Amendment's anti-commandeering rule.[4] This Court denied certiorari petitions presenting that question in *Christie I*, and it should do so again here. The court of appeals correctly applied this Court's Tenth Amendment precedents in adhering to *Christie I*'s holding that Section 3702(1) does not unconstitutionally commandeer the States. That holding

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[4] The petition for a writ of certiorari in No. 16-477 adopts (at 8) the arguments in the petition in No. 16-476. Unless otherwise noted, references to "Pet." and "Reply Br." refer to the petition and reply brief in No. 16-476.

does not conflict with any decision of another court of appeals. To the contrary, no other circuit has even considered a case involving PASPA. And as in *Christie I*, the question petitioners seek to raise has limited practical significance because Section 3702(2)—which petitioners do not challenge—would prohibit the sports gambling purportedly authorized by the 2014 Act even if this Court agreed with petitioners that Section 3702(1) is invalid. Further review is therefore unwarranted.

A. The Court of Appeals Correctly Held That Section 3702(1) Does Not Violate The Tenth Amendment

Section 3702(1) does not violate the Tenth Amendment because it neither compels States to regulate according to federal standards nor requires state officials to administer federal law. Instead, Section 3702(1) *prohibits* States from operating sports-gambling schemes themselves or affirmatively licensing or authorizing private parties to do so. Those prohibitions are a permissible exercise of Congress's authority to regulate state activities and to preempt state laws that conflict with federal policy in an area within Congress's enumerated powers. Such prohibitions are commonplace and raise no commandeering concern. And that remains true where, as here, a particular state law conflicts with a valid federal prohibition as a result of a partial repeal of existing statutes rather than by virtue of an entirely new enactment. The inquiry focuses on the substantive interaction between state and federal law—not on the state law's formal label or the process by which it was adopted.

1. Section 3702(1) does not violate the Tenth Amendment because it does not compel States to enact or administer federally prescribed regulations

a. Under the Tenth Amendment, "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Printz* v. *United States*, 521 U.S. 898, 925 (1997); see *New York* v. *United States*, 505 U.S. 144, 161-166 (1992). As this Court explained in *Printz*, that anti-commandeering principle precludes Congress from affirmatively requiring States to enact or administer federally prescribed regulatory requirements:

> We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the States' officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.

521 U.S. at 935.

Congress may, however, *prohibit* States from enacting laws that conflict with federal policy. "A wealth of precedent attests to congressional authority to displace or pre-empt state laws regulating private activity." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981); see *ibid.* (collecting cases). The constitutionality of such legislation follows directly from the Supremacy Clause, which makes federal laws enacted pursuant to the Constitution "the supreme Law of the Land" and requires inconsistent State laws to give way. U.S. Const. Art. VI, Cl. 2.

Countless federal statutes thus expressly prohibit States from enacting laws with specified features or bar all state regulation in particular fields.[5] "Although such congressional enactments obviously curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important, the Supremacy Clause permits no other result." *Hodel*, 452 U.S. at 290.

In addition, Congress may "regulate[] state activities" by, for example, prohibiting States from issuing certain types of bonds, *South Carolina* v. *Baker*, 485 U.S. 505, 514 (1988), or from selling personal information obtained in connection with motor vehicle records, *Reno* v. *Condon*, 528 U.S. 141, 151 (2000). Such regulations of the States' own activities do not violate the anti-commandeering principle because they "do[] not require the States in their sovereign capacity to regulate their own citizens" and "do[] not require state officials to assist in the enforcement of federal statutes regulating private individuals." *Ibid.*

b. This Court has found that a federal statute violated the Tenth Amendment's anti-commandeering

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[5] See, *e.g.*, 7 U.S.C. 1639i(b) ("[n]o State * * * may directly or indirectly establish under any authority or continue in effect" certain requirements related to food labeling); 12 U.S.C. 4122(a) ("[n]o State * * * may establish, continue in effect, or enforce" certain requirements related to mortgages); 15 U.S.C. 376a(e)(5)(A) ("[n]o State * * * may enact or enforce any law or regulation" placing specified restrictions on delivery of cigarettes or smokeless tobacco by common carriers); 23 U.S.C. 102(a) ("[n]o State * * * may enact or enforce a law" with the principal purpose of restricting access to highways by motorcycles); 49 U.S.C. 41713(b)(1) ("a State * * * may not enact or enforce a law, regulation, or other provision * * * related to a price, route, or service of an air carrier"); see also Br. in Opp. 24 n.4 (collecting other examples).

principle only twice, in *New York* and *Printz*. As the court of appeals held in *Christie I* and reaffirmed here, Section 3702(1) differs fundamentally from the statutes at issue in those cases because it does not impose an "affirmative command" or a "coercive either-or requirement" on States. Pet. App. 25a; see *NCAA* v. *Governor of N.J.*, 730 F.3d 208, 231-234 (3d Cir. 2013), cert. denied, 134 S. Ct. 2866 (2014).

The statute at issue in *New York* directed States either to take ownership of nuclear waste or to regulate the waste in accordance with Congress's instructions. 505 U.S. at 153-154. This Court invalidated that provision because Congress lacked authority "to impose either option as a freestanding requirement"—and, in particular, because the second option would have "presented a simple command to state governments to implement legislation enacted by Congress." *Id.* at 175-176. Similarly, the statute at issue in *Printz* required state law enforcement officers to conduct background checks in connection with the transfer of handguns. 521 U.S. at 903. Both statutes thus turned the States into agents of the federal government, forcing them to enact federally prescribed legislation or to execute federal law.

Section 3702(1) is different. It does not obligate States to enact any law or to implement or administer any federal regulatory requirement. "PASPA does not *require* or coerce the states to lift a finger—they are not required to pass laws, to take title to anything, to conduct background checks, to expend any funds, or to in any way enforce federal law." *Christie I*, 730 F.3d at 231. Instead, portions of Section 3702(1) permissibly "regulate[] state activities," *South Carolina*, 485 U.S. at 514, by barring States themselves from "spon-

sor[ing], operat[ing], advertis[ing], [or] promot[ing]" sports-gambling schemes. 28 U.S.C. 3702(1). Other portions of the statute permissibly "pre-empt state laws regulating private activity," *Hodel*, 452 U.S. at 290, by prohibiting States from "licens[ing], or author-iz[ing] by law or compact," sports-gambling schemes. 28 U.S.C. 3702(1). And because PASPA "does not require the States in their sovereign capacity to regulate their own citizens," "does not require [the States] to enact any laws or regulations," and "does not require state officials to assist in the enforcement of federal statutes," it is, like the statute this Court upheld in *Condon*, "consistent with the constitutional principles enunciated in *New York* and *Printz*." 528 U.S. at 151.

2. The fact that Section 3702(1) prevents New Jersey from effectuating the specific partial repeal in the 2014 Act does not create a commandeering problem

a. In *Christie I*, petitioners argued that Section 3702(1)'s prohibition on state "authoriz[ation]" of sports gambling violates the Tenth Amendment because it requires States to maintain their existing prohibitions on sports wagering. 730 F.3d at 232. The court of appeals disagreed, explaining that Section 3702(1) prohibits only authorizations of sports gambling and thus would allow a State to "repeal its sports wagering ban" or to retain a ban while deciding "what the exact contours of the prohibition will be." *Id.* at 233. In opposing certiorari, the government similarly stated that Section 3702(1) does not "obligate New Jersey to leave in place the state-law prohibitions against sports gambling that it had chosen to adopt prior to PASPA's enactment" and instead leaves the State "free to repeal those prohibitions in whole or in

part." Br. in Opp. 11, *Christie* v. *NCAA*, 134 S. Ct. 2866 (2014) (Nos. 13-967, 13-979, and 13-980).

Seizing on those statements, petitioners asserted below that *any* law styled as a "partial repeal" cannot be an "authoriz[ation]" under PASPA and must be deemed consistent with Section 3702(1). Pet. App. 24a. Taken in context, that is plainly not what the court of appeals or the government meant in *Christie I*. The relevant provision of PASPA only prevents States from authorizing by law or licensing sports-gambling schemes. If New Jersey wishes to repeal its prohibition on sports gambling altogether and thereby remain silent with respect to such gambling, or to adopt a partial repeal that is not a *de facto* authorization (by, for instance, lifting state penalties on informal or social wagering), PASPA does not stand in its way. But the 2014 Act's partial repeal—which is specifically tailored to facilitate sports gambling at state-licensed casinos and racetracks—is no different from a positive enactment authorizing such gambling.

The court of appeals correctly recognized that common-sense point. The court explained that *Christie I* did not involve a partial repeal, much less a conditional and carefully gerrymandered partial repeal like the one in the 2014 Act. Pet. App. 13a-14a, 23a. The court emphasized that "[t]he presence of the word 'repeal' does not prevent [the court] from examining what the provision actually does." *Id.* at 14a. Focusing on substance rather than form, the court concluded that "a state's decision to selectively remove a prohibition on sports wagering in a manner that permissively channels wagering activity to particular locations or operators is, in essence, 'authorization' under PASPA." *Id.* at 23a.

The court of appeals did not, however, retreat from *Christie I*'s conclusion that "PASPA allows states to 'choose among many different potential policies on sports wagering that do not include licensing or affirmative authorization by the State.'" Pet. App. 23a (brackets and citation omitted). The court thus took pains to make clear that Section 3702(1) does not consign States to an all-or-nothing choice between leaving their existing prohibitions on sports gambling intact or repealing them altogether. *Id.* at 13a, 23a, 24a. The court held only that the "specific partial repeal which New Jersey chose to pursue in its 2014 Law" constituted a prohibited authorization. *Id.* at 24a.

b. Petitioners do not seek this Court's review of the court of appeals' statutory holding that the 2014 Act is, in substance, an "authoriz[ation] by law" of sports gambling. Pet. App. 14a; see Pet. i (presenting only petitioners' Tenth Amendment claim); 16-477 Pet. i (same). Petitioners are correct to abandon their statutory argument. That argument would have eviscerated PASPA, because virtually any licensing or authorization of sports-gambling schemes could be reformulated as a partial repeal.

For example, the 2012 Act at issue in *Christie I* placed sports gambling under New Jersey's existing regulatory framework for casino and racetrack gambling. Petitioners conceded that the 2012 Act conflicted with Section 3702(1)—indeed, it was "precisely what PASPA says the states may not do." *Christie I*, 730 F.3d at 227; see Senate Report 5 (explaining that PASPA was intended to block pending proposals to authorize "casino-style sports books"). Yet the 2012 Act could have been reformulated as a statute "partially repealing" prohibitions on sports gambling to the

extent they apply to casinos and racetracks that conduct sports gambling in conformity with the regulatory framework governing their other gambling activities. And virtually any other license or authorization could likewise be reframed as a partial repeal conditioned on the satisfaction of specified requirements.

Conversely, although formally styled as a partial repeal, the 2014 Act is equivalent to a statute providing that, notwithstanding the State's general prohibition of sports gambling, "casinos and racetracks are authorized to conduct sports gambling" if they satisfy the 2014 Act's requirements governing the location of the gaming, the persons who may place wagers, and the sporting events that may be the subject of betting. And like the 2012 Act, the 2014 Act accomplishes "precisely what PASPA says the states may not do" by approving gambling at state-licensed casinos and racetracks. *Christie I*, 730 F.3d at 227. Accordingly, like the 2012 Act, the 2014 Act is an "authoriz[ation] by law" foreclosed by Section 3702(1). Indeed, as the United States argued in the court of appeals, the 2014 Act also "license[s]" sports-gambling schemes, 28 U.S.C. 3702(1), by effectively expanding the gambling licenses held by casinos and racetracks to include sports wagering. Gov't C.A. Br. 10-13.

c. Having abandoned their challenge to the court of appeals' statutory holding, petitioners now contend that applying Section 3702(1) to invalidate a state statutory scheme created through a partial repeal like the 2014 Act fundamentally transforms the Tenth Amendment analysis and raises new constitutional questions not presented in *Christie I*. They are mistaken.

Petitioners' premise, which underlies virtually all of their arguments, is that "[t]o require [a] State to maintain *any* state law prohibition that it wishes to repeal is 'fundamentally incompatible with our constitutional system of dual sovereignty.'" Pet. 24 (citation omitted). Petitioners thus identify the asserted Tenth Amendment problem in these cases as the fact that a federal statute and a federal court have effectively required New Jersey "to maintain state-law prohibitions that its elected officials chose to lift." Pet. 3; see, *e.g.*, Pet. i, 20, 29; Reply Br. 3. But petitioners cite no decision embracing their view that a commandeering problem arises whenever federal law prevents a State from giving effect to any possible repeal of an existing state law, and such a rule would yield absurd results.

New York and *Printz* establish that "Congress cannot compel the States to enact or enforce a federal regulatory program." *Printz*, 521 U.S. at 935. Those decisions indicate that a federal statute would present Tenth Amendment problems if it purported to compel States to maintain a specific federally prescribed scheme regulating private parties. But that does not mean that *any* situation in which a federal statute prevents a State from giving effect to a particular repeal of state law violates the Tenth Amendment. "A wealth of precedent" confirms that Congress may, consistent with the Tenth Amendment, prohibit States from adopting laws with specified features. *Hodel*, 452 U.S. at 290. Once Congress has done so, a State's attempt to adopt a law with the prohibited features is validly preempted whether the State acts through an entirely new enactment or through a partial repeal of existing law.

For example, Congress has prohibited States from imposing any tax on electricity that "discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers." 15 U.S.C. 391. A State could not evade that prohibition by first adopting a nondiscriminatory tax and then, sometime later, partially repealing that tax to the extent it applied to in-state entities. And a State barred from taking that step could not be heard to complain (Pet. 24) that Section 391 violates the Tenth Amendment by requiring the State to maintain a law "that it wishes to repeal." Section 391 does not require the States to structure their tax laws in a specific way, or to leave any particular tax on the books. But it does validly preempt discriminatory taxes—even when the discrimination results from a partial repeal. Such preemption of a specific partial repeal does not unconstitutionally "commandeer" the States; rather it "follows directly from the Constitution's instruction that a state law may not be enforced if it conflicts with federal law." *Riley* v. *Kennedy*, 553 U.S. 406, 427 (2008).[6]

So too here. Section 3702(1) preempts state laws that "license" or "authorize by law" sports-gambling schemes. That provision neither freezes States' exist-

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[6] Equivalent examples could be constructed based on many other federal statutes that preempt state laws that differentiate between specified classes of entities. See, *e.g.*, 12 U.S.C. 25b(b)(1) (preempting certain laws that "directly or indirectly discriminate against national banks"); 12 U.S.C. 4122(b) (exempting from preemption certain laws "of general applicability to both housing receiving Federal assistance and nonassisted housing"); 15 U.S.C. 6733(b) (barring differential treatment of certain insurers); 15 U.S.C. 6760(b)(1) (same); 31 U.S.C. 313(f)(1) (same); 47 U.S.C. 332(c)(3)(A) (exempting from preemption certain regulations imposed "on all providers of telecommunications service").

ing gambling prohibitions in amber nor requires that the States enact or maintain any particular law. It simply means that a State may not structure its laws in a manner that "license[s]" or "authorize[s] by law" sports gambling. And just as 15 U.S.C. 391 and other similar provisions do not unconstitutionally commandeer the States even though they prohibit certain specific repeals of existing state laws, Section 3702(1) poses no Tenth Amendment problem even though it prevents New Jersey from enacting the "specific partial repeal" in the 2014 Act. Pet. App. 24a.[7]

d. Petitioners object (Pet. 31-34) to the court of appeals' failure to articulate a comprehensive rule establishing the point at which "a partial repeal of a sports wagering ban amounts to an authorization" under PASPA. Pet. App. 24a. For example, although the court suggested that PASPA would not foreclose "a state's partial repeal of a sports wagering ban to allow *de minimis* wagers between friends and family," *ibid.*, petitioners criticize (Pet. 33) the court's failure to specify whether PASPA would allow hypothetical laws decriminalizing "office pool wagering," "sports wagering by individuals of any age, rather than just those over 21," or "the operation of sports pools at bars, law offices, restaurants, or judicial offices instead of casinos."

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[7] Petitioners emphasize (*e.g.*, Pet. i, 2-3; Reply Br. 3, 5-6) the district court's grant of injunctive relief. But an injunction enforcing a valid federal law presents no independent commandeering concern. "[T]he Supremacy Clause makes federal law paramount over the contrary positions of state officials; the power of federal courts to enforce federal law thus presupposes some authority to order state officials to comply." *New York*, 505 U.S. at 179.

Petitioners' criticism is misplaced. The court of appeals should not be faulted for declining to opine on hypothetical cases or laws that are not presented here and that may never arise at all. This Court commonly reserves judgment on questions that are not necessary to its resolution of the case before it. See, *e.g.*, *Kingdomware Techs., Inc.* v. *United States*, 136 S. Ct. 1969, 1977 n.4 (2016); *Alice Corp.* v. *CLS Bank Int'l*, 134 S. Ct. 2347, 2357 (2014). Nor are petitioners well positioned to invoke the asserted lack of clarity in the court of appeals' interpretation of Section 3702(1) as a basis for further review, because petitioners themselves have now eschewed their statutory arguments to focus exclusively on their Tenth Amendment claim. Pet. i; 16-477 Pet. i.[8]

B. The Question Presented Does Not Warrant This Court's Review

1. Petitioners do not contend that the court of appeals' decision upholding Section 3702(1) conflicts with any decision of another court of appeals. Indeed, although PASPA has been on the books for a quarter century, it has apparently given rise to only a handful

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[8] Petitioners assert (Pet. 33-34) that the court of appeals' decision is a "threat to state sovereignty" because it assertedly deprives the States of clear notice about what Section 3702(1) allows. But the clear-statement rule petitioners invoke is an incident of the Spending Clause; it has no application to Commerce Clause legislation like PASPA, which imposes unconditional limitations on state authority rather than inviting States to enter into a bargain with the federal government. See *National Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 576 (2012) (opinion of Roberts, C.J.). And any concern about notice is mitigated by PASPA's remedial provision, which authorizes only injunctive relief and thus creates no risk of financial liability for a State that contravenes Section 3702(1). 28 U.S.C. 3703.

of suits, all in the Third Circuit. See Br. in Opp. 19-20 & n.3. Apart from New Jersey's recent efforts to foster sports betting at the State's casinos and racetracks, only one other State has enacted legislation challenged under Section 3702(1): Delaware, which unsuccessfully argued that various forms of sports lotteries fell within PASPA's grandfathering clause, 28 U.S.C. 3704(a)(1). See *OFC COMM Baseball* v. *Markell*, 579 F.3d 293, 301-304 (3d Cir. 2009), cert. denied, 559 U.S. 1106 (2010). No other State has enacted legislation claimed to conflict with PASPA, and even petitioners' amici States do not profess any desire to enact laws comparable to the 2014 Act. The absence of a conflict on the question presented and the paucity of PASPA litigation of any kind counsel against this Court's review.[9]

2. The limited practical consequences of the question presented confirm that this Court's review is unwarranted. Petitioners' commandeering challenge is directed solely at Section 3702(1), the provision of PASPA that disallows States from licensing or authorizing sports-gambling schemes. But another provision of PASPA, Section 3702(2), independently prohibits private parties from "sponsor[ing], operat[ing], advertis[ing], or promot[ing]" sports-gambling schemes "pursuant to [state or local] law or compact." 28 U.S.C. 3702(2). Petitioners have not questioned the constitu-

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[9] The petitioner in No. 16-477 errs in asserting (Pet. 11-12) that the court of appeals' decision conflicts with the decisions of three state courts of last resort. The cited decisions simply quoted *New York* and *Printz*; none involved a Tenth Amendment challenge to a federal statute. See *Reed-Kaliher* v. *Hoggatt*, 347 P.3d 136, 141 (Ariz. 2015); *Ter Beek* v. *City of Wyoming*, 846 N.W. 2d 531, 538 (Mich. 2014); *State* v. *Nelson*, 195 P.3d 826, 834 (Mont. 2008).

tionality of Section 3702(2) under the Tenth Amendment, and they could not plausibly do so because the Tenth Amendment does not "shield[] the States from pre-emptive federal regulation of *private* activities affecting interstate commerce." *Hodel*, 452 U.S. at 291.

Accordingly, even if this Court granted review and agreed with petitioners that Section 3702(1) violates the Tenth Amendment, the sports-gambling schemes purportedly authorized by the 2014 Act would still be prohibited by Section 3702(2). The court of appeals made that point explicit in *Christie I*, observing that "even if" Section 3702(1) "were excised from PASPA, [Section] 3702(2) would still plainly render the [2012 Act] inoperative by prohibiting private parties from engaging in gambling schemes pursuant to that authority." 730 F.3d at 236. That basic point remains true. As in *Christie I*, the fact that Section 3702(2) independently prohibits the gambling New Jersey seeks to authorize substantially diminishes the practical significance of the question petitioners ask this Court to answer. The Court should therefore treat that question the same way it did in *Christie I* and again decline further review.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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